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NO. 84-1308

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1984

FREEMAN (TEEK) BOSLEY, JR., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,

Petitioners,

v.

SHIRLEY BARNES, FRANCES J. McELROY, and MURREL THOMAS,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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24 pp

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

TABLE OF AUTHORITIES

Air Terminal Cab, Inc. v. United States, 478, F.2d 575 (8th Cir. 1973) cert. denied 414 U.S. 904, 94 S.Ct. 228, 38 L.Ed. 2d 146 (1973) 2, 6

Barnes v. Bosley, et al., 568 F.Supp. 1406 (E.D. Mo 1983); 745 F.2d 501 (8th Cir. 1984) 4, 6, 12, 15 17

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed. 2d 574 (1980) 3, 4, 5, 10, 11 16, 17, 18, 19

Buckley v. Valeo, 424 U.S. 1, 64-65, 96 S.Ct. 612, 656, 46 L.Ed. 2d 659 (1976) 17

Connick v. Meyers, 461 U.S. 138, 103 S.Ct. 1684 (1983) 9

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed. 547, (1976) 3, 4, 5, 10, 12 16, 17, 18, 19, 20

Landry v. Farmer, 564 F.Supp. 598 (D.C. R.I. 1983) 11, 13

Loughney v. Hickey, 635 F.2d 1063 (3rd Cir. 1980) 18, 19

McBee v. Jim Hogg County, 730 F.2d 1009 (5th Cir. 1984) (en banc) 9

Mount Healthy City School Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, L.Ed. 471 (1974) 5, 8, 10, 11, 14, 16

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981) 9, 10, 12

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d. 811 (1968) 9, 12, 17, 18

Pullman - Standard v. Swint, 102 S.Ct. 1781, 1790, 72 L.Ed. 66 (1982) 2

Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980) 8, 10, 12 14, 16

SUPREME COURT RULES

Rule 52(a) Federal Rule of Civil Procedure 1

TREATISES

MOORE'S FEDERAL PRACTICE 1, 2

WRIGHT & MILLER CIVIL PROCEDURE 1, 2

ARGUMENT

I. CLARIFICATION OF THE PROPER ROLE OF THE FINDERS OF FACT AND LAW IN FIRST AMENDMENT CASES WHERE POLITICAL AFFILIATION IS ALLEGED

Rule 52(a) of the Federal Rules of Civil Procedure sets forth the scope of review on findings by the District Court:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Referred to as the "clearly erroneous" rule, considerable case law has interpreted and its delimited application. This rule has not been interpreted to preclude the review of findings of fact. See 9 WRIGHT AND MILLER, CIVIL PROCEDURE SECTION 2585. Although the "clearly erroneous" rule may be applicable to findings of fact, it is not applicable to questions of law. 5A MOORE'S FEDERAL PRACTICE SECTION

52-76(2). Nor is it applicable to rulings that involve mixed questions of law and fact. Pullman - Standard v. Swint, 102 S.Ct. 1781, 1790; 72 L.Ed. 66 (1982); 9 WRIGHT AND MILLER, CIVIL PROCEDURE Section 2589. Further, findings made by the District Court which are based upon inferences drawn from documentary and/or undisputed facts can be set aside. Air Terminal Cab, Inc. v. United States, 478 F.2d 575, (8th Cir. 1973), cert. denied 414 U.S. 904, 94 S.Ct. 228, 386 L.Ed. 2d 146 (1973).

Respondents in their Brief in Opposition adopt the position that the findings of the District Court are conclusive and not properly before this Court for review. Respondent has, however, failed to make a distinction between findings of fact, legal findings, and mixed findings of fact and law. The

instant case involves errors of law and errors of mixed fact and law.

(a) Findings of Mixed Fact and Law

The present state of First Amendment law where Elrod-Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980) is applied requires that the Court's analysis involve three steps. In the first step, the Court interprets the facts to decide which legal standard should be applied to the case. Step two involves the selection of that standard either the "sole motive" or the Mount Healthy test. Mount Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1974). In step three, the fact finder (in this case the Judge) applies the legal standard to these facts. Finally, in step four the fact finder reaches a legal conclusion. Where a case, is tried before the Court as opposed to a jury,

the findings made by the Court involve mixed findings of fact and law as the Court interprets the facts twice to reach the ultimate legal conclusion. The problem arises, however, when the court makes a legal finding, that the "sole motive" test applies. The court in deciding to apply the "sole motive" test reaches the legal conclusion that should be made in step four, and thus step three is omitted. This omission in the legal analysis made by the fact finder (Judge) is an error of mixed fact and law and is thus properly before this court for review.

In the instant case, the Court decided to apply the Elrod-Branti test. In its decision the District Court states:

> The Supreme Court in Elrod and Branti established the doctrine that public employees cannot be fired on account of their political beliefs.

568 F. Supp. at 1408. Thus the Court had to reach the legal conclusion that they were terminated because of their political beliefs before applying the Elrod-Branti test to the facts. Because of the inherent bias in this test against the Defendants, this Court must address this problem by setting forth factors which a court must consider in interpreting the facts to reach a legal conclusion that the "sole motive" or the Mount Healthy tests apply. Under the present Elrod-Branti analysis, mere allegations of discharge by political association is certain to result in a finding for the plaintiff.

(b) Findings Based on Documentary Evidence and/or Undisputed Facts

Findings of the trial court which are based upon inferences as drawn from documentary evidence and/or undisputed

facts can be set aside. Air Terminal Cab, Inc. v. United States, 478 F.2d 575 (8th Cir. 1973).

In the case at bar, the District Court erroneously placed significance on certain facts:

1) plaintiffs' discharge three days after the defendant was sworn in;

2) defendant Bosley's letter to Judge Gaertner of the Circuit Court;

3) plaintiffs political affiliation with the former Clerk Roddy.

4) the termination letter's characterization of plaintiffs positions as "policy-making and/or confidential."

5) Bosleys' public statements to the effect that he had the desire and the right to bring in "his own team".

These facts, relied on by the trial court, were based upon the Court's inferences drawn from documentary evidence: the letter to plaintiffs and

the letter to the Judge and the Court's inferences drawn from other facts: the date of discharge of the plaintiffs, plaintiffs' political affiliation, and public statements made by Petitioner Bosley.

The significance placed upon, and the inferences drawn from this evidence by the District Court were erroneous. The fact that the Petitioner replaced the plaintiffs with better qualified persons, as acknowledged by the District Court would negate a finding of sole motive. Petitioners have set forth in their Petition for Writ of Certiorari additional countervailing factors which the District Court failed to take into account.

II. CONFLICT AMONG THE CIRCUITS EVIDENCES THE NEED FOR UNIFORMITY IN FIRST AMENDMENT LAW AND PRESERVATION OF THE VITAL PUBLIC INTEREST IN EFFICIENT AND EFFECTIVE GOVERNMENT

Respondent, in his brief at pages nine through twelve, incorrectly characterizes Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980); Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981); and Landry v. Farmer, 564 F.Supp. 598 (D.C. R.I. 1983) as "mixed motive" cases. Respondent appears to label any case where the Mount Healthy test is applied as a "mixed motive" case. This interpretation of First Amendment law is inaccurate, as the term "mixed motive" applies to the burden of proof; it is not a conclusion of law.

In Tanner v. McCall, supra the Fifth Circuit referred to the allocation of the burden of proof. It approved of the application of Mount Healthy as the proper method of allocating the burden of proof, however; this its approval not constitute a finding of "mixed motive".

Further, the Court addressed the problem of the legal standard in McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984) (en banc) and concluded that the Pickering balance test was the appropriate legal standard to apply in First Amendment cases. By citing Connick v. Meyers, 46 U.S. 138, 103 S.Ct. 1084 (1983), a free speech First Amendment case, the McBee court removed any doubts that First Amendment free speech precedent lacks broader First Amendment application.

Nor did the Seventh Circuit in Nekolny v. Painter, supra make a legal finding of "mixed motive"; rather there, the court rejected outright any application of a "sole motive" standard in its burden of proof analysis:

> We must reject the defendant's suggestion that we adopt a "sole motive" test . . . to require that the plaintiff prove that the

> protected conduct was the "sole motive" for his termination would, in our view, run the risk of not adequately protecting victims of First Amendment violations.

653 F.2d at 1168. The Nekolny Court applied Mount Healthy to properly protect the rights of the plaintiff, and further stated that this burden was not insignificant, that it was not satisfied by simply showing that he carried the political card of the opposing party or that he favored the defendant's opponent in the election. Nekolny at 1168. This case clearly conflicts with the court's conclusion in Tanner. Nekolny stands for the proposition that the "sole motive" test does not adequately protect the employee, whereas Tanner states that Elrod-Branti, "lie(s) at the extreme of the employee's side...". Tanner at 1014. No clearer conflict can exist between circuits.

The fact that the District Court found in Landry v. Farmer, as stated in Respondent's brief at page eleven, that the Mount Healthy test survived Branti, does not constitute a legal finding of "mixed motive". The Court's decision in Landry in fact rejected any application of a "sole motive" test and thus was not concluding that Landry was a "mixed motive" as opposed to a "sole motive" case. The legal conclusion drawn by the Court regarding the proper allocation of the burden of proof is found in the following paragraph in its opinion:

> ... the Mount Healthy test for proving a First Amendment violation survives Branti. Branti did not address the burden of proof question and the Court does not read it as requiring a plaintiff to prove that he was discharged solely for the reason that he was not affiliated with or sponsored by the political party in office.

564 F.Supp at 604.

The Eighth Circuit, in the instant case, saw no need to apply a "sole motive" test, however it failed to reverse the District Court legal finding of "sole motive" to clarify the law within the Eighth Circuit. Thus, the Eighth Circuit panel appears to be in agreement with the Seventh, First and Fifth Circuits on the burden of proof analysis, however, it was not consistent with the Fifth Circuit on the legal standard applied; it concluded that Pickering was not applicable to this case. The significance of this conflict cannot be overstated. A reading of Tanner and Barnes clearly shows that completely different conclusions were reached in cases with similar facts. In both cases Defendants stated that they had their own people they wanted brought

in; neither Defendant fired all supporters of the opposing candidates, and neither Defendant appointed ardent political supporters to the vacated positions.

Thus, Respondent's assertation that there is no conflict in the decisions of the various circuits, results from an erroneous interpretation of the law. The conflicts are clear. Moreover there is conflict on more than one aspect of First Amendment law. There are differences in the burden of proof applied in the various cases, and differences over the appropriate legal standard.

Clarification of the conflicts in the Circuits also requires that this Court restate the continuing validity of the public's interest in efficient and effective government.

III. THIS COURT MUST SET FORTH THE PROPER ALLOCATION OF THE BURDEN OF PROOF FOR CONSISTENT APPLICATION OF FIRST AMENDMENT LAW

Once the District Court has selected the appropriate test to apply to the facts of the case, confusion still remains over the allocation of the burden of proof. If, for example, the Court determines that the Mount Healthy test is applicable, after the Plaintiff has established a prima facie case what, then is the duty of the Defendant? Is it sufficient for the Defendant to rebut the evidence as presented by the Plaintiff as in Tanner v. McCall, supra at 1190? If so, does the burden then shift back to the Plaintiff to show that Defendant's evidence is pretextual? Or, on the other hand, if Defendant must only rebut the evidence presented by the Plaintiff, must he also go forward and show that the

Plaintiff would have been terminated despite the alleged First Amendment infringement, and that the least restrictive means was employed?

In the case at bar, after determining that the "sole motive" test would be applied, the District Court stated:

> Plaintiffs must make out a prima facie case by proving that political reasons were the sole factor behind their discharge. The burden of going forward with evidence then shifts to defendants who may show 1) that plaintiffs would have been discharged in any event for other reasons, or 2) that political affiliation is an appropriate requirement for plaintiff's former positions. (citation omitted)

568 F. Supp. at 1409-10.

Thus, the District Court below required that the Defendant go forward with the evidence rather than simply rebut that offerred by the Plaintiff.

Neither Elrod nor Branti addressed the burden of proof question. Thus, answers to these questions are necessary to further clarify the respective burdens on the Plaintiff and Defendant in these cases.

IV. THE PRINCIPLES OF DEMOCRACY CAN ONLY BE UPHELD IF THE COURT GIVES SOME DEFERENCE TO THE WILL OF THE ELECTORATE

The campaign platform of Petitioner Bosley was to bring sound management and efficiency to the Clerk's office. Petitioner was elected to office with this mandate, and in an effort to carry it out, terminated four employees out of two hundred and twenty. Petitioner did not dismiss even five percent of the employees of the Clerk's office. Thus it is clear that Petitioner used the least restrictive means to carry out this mandate.

The fact that the least restrictive means was not used by the parties in Branti and Elrod must limit the application of the Elrod-Branti test in cases where the governmental executives have used the least restrictive means. This is particularly significant where the office holder has the aim of improving governmental efficiency, in such cases, the First Amendment Rights of the employees must yield to this vital interest in government. Pickering v. Board of Education, supra at 568; Buckley v. Valeo, 424 U.S. 1.

The Eighth Circuit, by refusing to apply the Pickering balance test, ignores the administrative goal of efficient government and the method through which the goal was attained--the least restrictive means. The Eighth Circuit and all others must follow the lead of

the Fifth Circuit and apply the Pickering balance test and thus, employ a case-by-case approach to examine whether there was a vital interest in government executed through the least restrictive means.

The application of the Elrod-Branti test by the District Court below, precludes Petitioner from carrying out this vital interest of government. The court has placed the constitutional rights of four individuals above those of the citizens of St. Louis. This interpretation threatens the democratic values at the heart of this society--political expression through the ballot. As more eloquently stated by Judge Aldisert of the Third Circuit in Loughney v. Hickey:

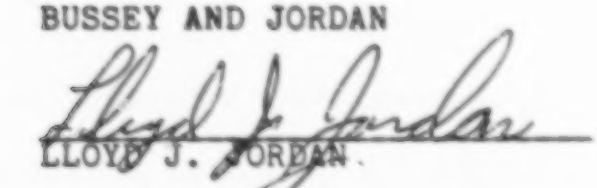
> The Elrod and Branti decisions vaunt intuitive moral values but by absolutizing these values the court has twisted the first amendment into

> an instrument that ruptures the political base of state government. What has been ruptured is not so much the notion of federalism as the basic fabric of a political democracy-effective self-government.

635 F.2d at 1070. The First Amendment rights of the individual must yield to the legitimate means of government. The proper method for balancing the rights of the individual against the needs of government as expressed by the electorate is the Pickering balance test.

Respectfully submitted,

BUSSEY AND JORDAN



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CERTIFICATE OF SERVICE

I, Lloyd J. Jordan, Counsel for Petitioners, do hereby certify that three copies of the foregoing Petitioners' Reply to Respondents' Brief in Opposition were served upon Counsel for Respondents by depositing said copies in the United States mail with first-class postage prepaid on the 11th day of April, 1985, addressed as follows:

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